

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v

PAUL NICOLETTI,
Defendant.

Case No. 15-20382

Hon. Victoria A. Roberts

M.J. Mona K. Mazoub

**DEFENDANT’S REPLY TO GOVERNMENT RESPONSE TO
DEFENDANT’S OBJECTIONS TO MAGISTRATE OPINION**

Defendant moved for discovery under FRCrP 16 and *Brady* of information regarding three federal government investigations of mortgage wrongdoing at the “victim” Fifth Third Bank during the run up to the financial crisis. The motion was referred to the magistrate, who issued an Opinion and Order that the motion be denied. R 38. Defendant timely filed objections. R 39. The government filed a Response, R 42.

In its Response, the government correctly notes that the Sixth Circuit Pattern Criminal Jury Instructions on fraud offenses contain a “person of ordinary prudence,” or objective, standard. The government also concedes that there is a circuit split on the issue, which it maintains has not been resolved by the Supreme Court. For example, the pattern criminal jury instructions of the Fifth Circuit, Instruction 2.58A and B, and of the Tenth Circuit, Instruction 2.58, use the definition from the Supreme

Court decisions in *Neder* and *Gaudin*, that “a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed,” and do not reference a hypothetically perfectly reasonable lender.

Defendant maintains the objective standard cannot be reconciled with Supreme Court precedent holding that materiality requires a look at the decision maker. With all respect to the Sixth Circuit, it does not have the prerogative to re-write Supreme Court jurisprudence. While there may be a circuit split, that is simply due to some circuits not following binding precedent.

For all the above reasons, Defendant requests that the Court grant Defendant’s motion for discovery of the results of the government investigations of Fifth Third.

Dated: January 23, 2017

s/John Minock
Attorney for Defendant
339 E. Liberty Street, Suite 200
Ann Arbor, Michigan 48104
734-668-2200; fax: 734-668-0416
jminock@cramerminock.com

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

s/John Minock